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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CASTIBLANCO et al., Defendants and Appellants.	B284319 (Los Angeles County Super. Ct. No. KA104924)

APPEALS from judgments of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Affirmed in part, reversed in part, and remanded.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Michael Castiblanco.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Juan Cortez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants and appellants Michael Castiblanco and Juan Cortez of first degree murder (Pen. Code, § 187, subd. (a))[1] and second degree robbery (§ 211). The jury found true the special circumstance allegation that the murder was committed while the defendants were engaged in the commission of a robbery (§ 190.2, subd. (a)(17)(A)) and the allegation that a principal was armed with a firearm during the commission of the offenses (§ 12022, subd. (a)(1)). The trial court sentenced defendants to terms of life in prison without the possibility of parole for their murder convictions plus one year for the firearm enhancements. Sentences on the robbery convictions were stayed under section 654.

On appeal, Castiblanco contends insufficient evidence supported his murder conviction in light of Senate Bill 1437 (SB 1437), insufficient evidence supported the special circumstance finding, the prosecutor committed misconduct in misstating the requirements for a true finding on the special circumstance allegation, and the parole revocation fine should be stricken if the special circumstance finding is not reversed. Cortez contends insufficient evidence supported his murder conviction in light of SB 1437; the trial court abused its discretion in admitting gang evidence, other crimes evidence, and in

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[1] All further statutory citations are to the Penal Code unless otherwise noted.

restricting his expert witness's testimony; the testimony of a witness who identified him was untrustworthy; there was insufficient evidence identifying him as a perpetrator; the trial court abused its discretion in failing to sever his trial from Castiblanco's trial; the trial court erroneously instructed the jury on the prosecution's natural and probable consequences theory; and the cumulative effect of the errors requires reversal.[2] We reverse defendants' special circumstance findings, otherwise affirm the judgment, and remand for resentencing.

II. BACKGROUND

A. *Evidence About Colombian Theft Crews' Methods of Operation*

Los Angeles Police Department Detective Marcelo Raffi testified as an expert on the methods of operation used by South American theft "groups" or "crews" when committing take-down or smash and grab robberies. A Colombian crew that steals jewelry will focus on an area within a city where there is a high density of jewelry stores. The crew drives by jewelry stores looking for traveling jewelry salesmen. Such salesmen carry as much as $2 million in jewelry in a satchel or rolling bag which they attempt to sell to jewelry stores. The crews are experienced at identifying jewelry salesmen.

Once a jewelry salesman is spotted, a member of the crew—a "foot person"—is deployed to look through the jewelry store

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[2] Without providing further legal authority or contentions, Cortez joins in the briefs filed or to be filed by Castiblanco and adopts any argument that might accrue to his benefit.

window, or to enter the jewelry store posing as a customer, to try to determine the nature of the jewels the salesman is carrying. The crew then surveils the salesman as he travels from store to store, learning where the salesman keeps his jewelry—in which bag and in which part of the salesman's car.

The crews are very patient and will follow a salesman all day waiting for an opportunity to rob him. The crews prefer to rob a jewelry salesman while he is inside his car "because it's more contained. It's a lot cleaner. They have more control over the situation."

Typically, a crew will use two to three cars and four or five members in executing a robbery. When the salesman stops his car, the crew will block the salesman's car from the front and back. The crew members then approach the salesman's car and smash his windows. One member of the crew is assigned to hold a knife to the driver's throat and order him not to move. Another is assigned to puncture a tire on the salesman's car so he cannot pursue the robbers. A third is assigned to remove the bags containing the jewelry from the car.

The crew members then return to their cars and flee in different directions. "In the meantime, the jeweler has no idea what just happened. All they know is the window is imploding. They know they got robbed, and it's very traumatizing for the victims."

The crews employ different tactics with respect to banks. A crew member will go to a bank, stand in a teller line, and look for someone who withdraws a large amount of cash. If no customer makes a sufficiently large withdrawal, the crew moves on to a new bank. If a victim is identified, the crew follows him.

According to Detective Raffi, many people who withdraw a large amount of money from a bank will make a subsequent stop. During that stop, they often will hide their money in their car to avoid being robbed. The crew members know this and prefer not to have a confrontation. So, when the victim exits the car during the subsequent stop, the crew members will approach the car, smash the windows, and grab the cash.

B. *Evidence About the February 1, 2013, Robbery*

At about noon on February 1, 2013, Sheron Khemlani and his brother Nimon bought jewelry from a store as gifts for family members. At around 2:30 p.m., Veronica Carmona and her 14-year-old daughter Victoria Gonzalez drove to the Eastland Shopping Center in West Covina to get some food and to shop. Carmona parked and turned off the car. When she took the keys out of the ignition, she saw two men walk to and get in a Ford Fusion parked to the right of the car facing hers.

Carmona twice heard a whistling sound. She then saw three men, including Castiblanco and Cortez, approach the Fusion. Cortez broke the passenger window and struggled with the passenger. Castiblanco broke the driver's window. The third man broke the rear passenger windows. A car blocked in the Fusion.

Gonzalez testified that two men stood on the driver's side of the car: one next to the driver and the other next to the passenger seat behind the driver. The man next to the driver struggled with the driver and the person beside the passenger seat reached into the car and took some laptops.

Carmona saw Cortez reach and lean into the car, struggle with the passenger to open the door, and punch the passenger several times. She shifted her focus from the passenger to the driver when she heard Gonzalez gasp. Carmona saw the driver slump over. He was bleeding profusely. Castiblanco appeared to be shocked, he "kind of stood there like looking for a few seconds."

Castiblanco and the third man took items out of the car while Cortez continued to struggle with the passenger. The men then left with the items and placed them in their car and drove away. The car's license plate was covered with black paper. Carmona told Gonzalez to call 911.

The police and fire departments responded to the scene. Sheron died from a gunshot wound near his left ear. The bullet traveled left to right, back to front, and upward.

Nimon told the police the perpetrators took a black backpack from him containing $9,000. While taking Nimon's backpack, the perpetrator said, "Don't fight. Don't fight. Just let it go."

An officer found a "pocket-type" knife underneath the right rear tire of the Khemlanis' car. Castiblanco's DNA was found on the knife.

C. *Defendants' Jail Conversations*

The District Attorney extradited Cortez from Illinois, based on an arrest warrant for murder. The police held Cortez and Castiblanco in neighboring cells at the West Covina jail to stimulate conversation between them about the murder charge. Their conversations were recorded.

Cortez told Castiblanco, "[T]hese dudes don't have anything dude. [¶] . . . [¶] Otherwise, they would have had us by, by the neck." Castiblanco said, "They can't—they can't bring that against us just because they don't have anything." Cortez responded that if the prosecutors "had anything specific against us, [they] would not be asking us whether we know or don't."

Cortez and Castiblanco discussed possible sentences they might receive or negotiate. They speculated that they might receive between 10 and 20 years. Cortez explained that if they held out in their plea negotiations, they might get less time.

D. *Other Crimes Evidence*

1. The Torrance Robbery

On April 19, 2012, Bodil Adkison withdrew $5,000 from a Bank of America branch in Torrance. From there, Adkison drove to a Ralph's grocery store and then home. After she parked her car in the garage and got out, she heard a wheezing sound coming from one of her tires. As she was examining her tire, two young men approached and stole her purse. The men ran to a car and drove away. A police detective investigating the robbery determined that Adkison's right rear tire was flat.

Video surveillance from the Bank of America branch showed a man walking ahead of Adkison. When Adkison reached a teller, the man watched her. When a teller tried to speak with the man, he did not conduct any business. While Adkison was still at the teller, the man left the bank while talking on the phone and walked to a vehicle that appeared to be a Jeep.

At the same time, another man walked into the bank.[3] He exchanged some $1 bills for a $5 bill. When the teller gave Adkison her money, the man watched her. When she left the teller window, the man left with her while talking on his phone.

Video surveillance from the Ralph's market showed Adkison's vehicle arrive followed by a Jeep. Adkison got out of her car and walked toward the store. Although there were many available parking spaces, the Jeep parked next to Adkison's car. A man got out of the passenger side of the Jeep and entered the store. Another man got out of the Jeep and went to the area next to Adkison's right rear tire. The passenger who had entered the store left the store and returned to the Jeep.

2. The Cypress Robbery

On February 15, 2013, Detective Raffi was part of a task force that investigated South American theft groups. During a surveillance of an area of Cypress with many jewelry stores, an officer spotted Castiblanco.

With officers following him, Castiblanco got into a white Toyota Camry and drove to eight banks. At each bank, Castiblanco got out of the car and entered the bank, returning to his car a short time later. A passenger, "Velasquez," always remained in the car. After visiting the eighth bank, Castiblanco drove to the Lily Garden restaurant.

Castiblanco parked near the restaurant, taking up several spaces. Castiblanco and Velasquez got out of the car and walked

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[3] At sidebar, outside the presence of the jury, the detective identified this man on the videotape as Cortez. No testimony was presented to the jury identifying Cortez as the second man.

around the restaurant as if "casing" it. Castiblanco repositioned the car closer to the restaurant. Velasquez entered the restaurant while a second passenger got out of the car and served as a lookout. Shortly thereafter, Velasquez ran from the restaurant and jumped into the Camry. He was holding a black purse. The car drove away.

Officers pursued the Camry. It ultimately stopped, and Castiblanco was apprehended. Detective Raffi interrogated Castiblanco. Castiblanco admitted that he and his companions were following bank customers trying to get money. They followed a customer who had obtained money from the last bank at which they stopped to the Lily Garden restaurant. Velasquez volunteered to be the one to take the customer's purse. Castiblanco pleaded guilty to commercial burglary—the unlawful entry into the Lily Garden restaurant with the intent to commit larceny, conspiracy to commit a crime—burglary, and grand theft of personal property.

3. The Anaheim Robbery

On July 24, 2013, jeweler Bahram Famenini and his employee Dario Jimenez drove to three jewelry plazas trying to sell jewelry. They were carrying jewelry worth $200,000 to $220,000 in a bag.

At around 2:00 p.m., Famenini and Jimenez drove to a McDonald's in Anaheim to get some food. While in the drive-thru lane, two men in masks broke Famenini's car's window. One of the men, who tried to enter the car, carried a knife in each hand. The assailants said, "Give me the bag." Famenini tried to drive

away, but his path was blocked by the patron in front of him in the drive-thru lane.

The assailants grabbed the bag and fled in a grey Hyundai. The Hyundai's license plate was covered by paper. The car crashed a short distance from the McDonald's. Two men and a woman walked away from the car.

Cortez's fingerprint was found inside the Hyundai. His DNA was found on a pair of reading glasses and on a can recovered from the car. Castiblanco's DNA was found on a water bottle recovered from the car. Castiblanco pleaded guilty to two counts of second degree robbery.

4. The Evanston Burglary

On April 25, 2014, police in Evanston, Illinois were conducting a sting operation arising from vehicle burglaries that had been committed near a Sam's Club store. At about 10:00 a.m., Cortez and Yorsi Ortiz Flores entered the Sam's Club. As part of the sting operation, a female undercover officer purchased $9,800 worth of cigarettes from the Sam's Club.

The undercover officer left the Sam's Club followed by Cortez and Flores. Flores went to a vehicle while Cortez followed the undercover officer to determine which car she was driving. The undercover officer loaded the cigarettes in her car and drove away, followed by Cortez and Flores.

The undercover officer drove to a nearby Food 4 Less grocery store, parked, and got out of her car as if she were going to shop at the store. Cortez and Flores followed the undercover officer to the Food 4 Less and parked next to her car. After the undercover officer left her car, Cortez pried open the car's door

and tried to remove the cigarettes. Flores stood watch at the back of the undercover officer's car. Cortez was arrested.

E. *Flores's Testimony*

In 2013, Flores was Cortez's girlfriend. Flores pleaded guilty to robbing a jeweler with others in Illinois. Flores and her fellow robbers followed the jeweler to a gas station where they robbed him. Flores's role was to "drive a car and to block in another car so they couldn't—that car couldn't chase the robbers."

Flores testified that Cortez told her he stole from people—conduct he referred to as "work." Sometimes, Cortez told Flores about his work. On one occasion, Cortez told Flores there had been a fight at "work," and that someone had been seriously hurt. He was "trying to look for jewelry." He was holding someone down and fighting with them for his bags when someone else was shot. Cortez told Flores that they needed to leave Los Angeles. A few days later, they left for Chicago.

F. *Defense Evidence*

Dr. Kathy Pezdek, a professor of cognitive science, testified as Castiblanco's expert on eyewitness memory and identification. She explained the various factors that impact eyewitness identification: exposure time—the length of time looking at the perpetrator's face, distraction, obstructions, the stress of an event, disguise—anything that might cover the perpetrator's face,

same-race identification, time delay, biased identification test, and the inherent bias of in-court identification.[4]

III. DISCUSSION

A. *SB 1437*

During the pendency of this appeal, SB 1437 was signed into law. SB 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, SB 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder and addresses liability for murder. It also adds section 1170.95 to the Penal Code, which allows those "convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts . . . ." (§ 1170.95, subd. (a).) After SB 1437 was signed, Castiblanco, at our request, and Cortez, with our permission, filed supplemental briefs in which they contend insufficient evidence supports their murder convictions in light of SB 1437's amendments.

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[4] We set forth portions of Dr. Pezdek's testimony in greater detail below in connection with Cortez's argument that her testimony was improperly restricted and disparaged.

In closing argument, the prosecution did not argue that either defendant was the actual killer. Instead, it argued defendants were guilty as aiders and abettors or co-conspirators either under the felony murder rule or the natural and probable consequences doctrine. We adhere to our holding in *People v. Martinez* (Jan. 24, 2019, B287255) ___ Cal.App.5th ___ <http://www.courts.ca.gov/opinions.htm> that SB 1437's enactment of the petitioning procedure in section 1170.95 means the changes worked by the legislation do not apply retroactively on direct appeal. Defendants are entitled to pursue the procedure set forth in section 1170.95, but they are not entitled to SB 1437 relief without doing so.

B. *The Special Circumstance Findings*

Castiblanco, joined by Cortez, contends that insufficient evidence supports the robbery special circumstance finding because there is no evidence that his participation in the robbery demonstrated a reckless indifference to human life. We agree.

1. Standard of Review

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any*

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] The same standard of review applies to the sufficiency of the evidence supporting special circumstance findings. [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

2. Analysis

Section 190.2, subdivision (d) provides: "Notwithstanding subdivision (c), every person, not the actual killer, who, with *reckless indifference to human life* and as a *major participant*, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4." (Italics added.)

Section 190.2, subdivision (d) is the codification of language from *Tison v. Arizona* (1987) 481 U.S. 137, 158 (*Tison*) that held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* [*v. Florida* (1982) 458 U.S. 782 (*Enmund*)] culpability requirement"—i.e., culpability sufficient to permit, for Eighth Amendment purposes, the imposition of a death sentence on a defendant guilty of murder as an aider and abettor. (*People v.*

Banks (2015) 61 Cal.4th 788, 800 (*Banks*).)[5] There is significant overlap between being a major participant and having reckless indifference to human life as the greater the defendant's participation, the more likely it is that he acted with reckless indifference to human life. (*People v. Clark* (2016) 63 Cal.4th 522, 614-615 (*Clark*).)

As we explained above, the prosecution did not argue to the jury that either defendant was the actual killer, arguing instead that defendants were guilty as aiders and abettors either under the felony murder rule or the natural and probable consequences doctrine. Accordingly, our concern is whether the evidence was sufficient to show that defendants were major participants who acted with reckless indifference to human life when they robbed the Khemlanis. (§ 190.2, subd. (d).) We apply the principles set forth in *Banks*, *Clark*, *Enmund*, and *Tison* as follows:

a. Major participant

"The ultimate question pertaining to being a major participant is 'whether the defendant's participation "in criminal activities known to carry a grave risk of death" [citation] was sufficiently significant to be considered "major" [citations].'" [Citation.]" (*Clark, supra,* 63 Cal.4th at p. 611.) "[P]articipation in an armed robbery, without more, does not involve 'engaging in

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[5] Although developed in death penalty cases, the standards articulated in *Banks* apply equally in cases involving statutory eligibility under section 190.2, subdivision (d) for life imprisonment without parole. (*Banks, supra,* 61 Cal.4th at p. 804.)

criminal activities known to carry a grave risk of death.' [Citation.]" (*Banks, supra,* 61 Cal.4th at p. 805.)

Among the relevant factors to be considered in determining a defendant's major participant status are: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? [Fn. omitted.] What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Banks, supra,* 61 Cal.4th at p. 803.)

Castiblanco concedes there was sufficient evidence to support the conclusion that he was a major participant in the robbery. In support of his argument above that insufficient evidence supports his murder conviction in light of SB 1437, and without citing any authority addressing the major participant requirement or discussing any of the factors set forth in *Banks, supra,* 61 Cal.4th at page 803 for determining major participant status, Cortez argues that "[t]here was absolutely no evidence that [he] acted with malice as now defined in section 188, subdivision (a)(3)." Construing Cortez's argument as asserting he was not a major participant, we conclude there was sufficient evidence that he was a major participant.

Although there was no direct evidence that Cortez planned the robbery, the evidence supports the conclusion that Cortez was

part of a criminal ring that carried out sophisticated smash and grab armed robberies, including the robbery in this case. Cortez had a specific role in the robbery. He was to smash the passenger window next to Nimon and prevent Nimon from thwarting the robbery. In carrying out that role, Cortez smashed the front passenger side window and repeatedly punched Nimon. A knife was found near the right rear tire of the Khemlanis' car, the side of the car where Cortez stood, suggesting that Cortez was armed with a potentially lethal weapon. Cortez was in close proximity to Sheron when Sheron was shot. After Sheron was shot, Cortez continued to struggle with Nimon to allow Castiblanco and the third robber to take property out of the Khemlanis' car. Such evidence demonstrated that Cortez's "'participation "in criminal activities known to carry a grave risk of death" [citation] was sufficiently significant to be considered "major" [citations]. [ ]' [Citation.]" (*Clark, supra,* 63 Cal.4th at p. 611.)

b. Reckless indifference to human life

"'[T]he culpable mental state of "reckless indifference to life" is one in which the defendant "knowingly engag[es] in criminal activities known to carry a grave risk of death" [citation]. . . .' (*People v. Estrada* (1995) 11 Cal.4th 568, 577.) 'The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create.' (*Banks*, *supra*, 61 Cal.4th at p. 801.) '[I]t encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his

actions.' (*Clark, supra,* 63 Cal.4th at p. 617.)" (*In re Loza* (2017) 10 Cal.App.5th 38, 51-52.)

Recklessness has both subjective and objective elements. "The subjective element is the defendant's conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant's subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by an objective standard, namely what 'a law-abiding person would observe in the actor's situation.' [Citation.]" (*Clark, supra,* 63 Cal.4th at p. 617.) "[A]lthough the presence of some degree of defendant's subjective awareness of taking a risk is required, it is the jury's objective determination that ultimately determines recklessness." (*Id.* at p. 622.)

Among the relevant factors to be considered in determining whether a defendant acted with reckless indifference to human life are: knowledge of weapons, and use and number of weapons; physical presence at the crime and opportunities to restrain the crime and/or aid the victim; duration of the felony; the defendant's knowledge of a cohort's likelihood of killing; and the defendant's efforts to minimize the risks of the violence during the felony. (*Clark, supra,* 63 Cal.4th at pp. 618-623.) No one of the factors for determining reckless indifference "'is necessary, nor is any one of them necessarily sufficient.' [Citation.]" (*Clark, supra,* 63 Cal.4th at p. 618.)

Castiblanco argues that, although there was sufficient evidence he was a major participant, there is insufficient evidence he acted with reckless indifference to human life. We construe Cortez's argument that "[t]here was absolutely no evidence that [he] acted with malice as now defined in section

188, subdivision (a)(3)" as asserting there was insufficient evidence that he acted with reckless indifference to human life.

i. Knowledge of weapons, and use and number of weapons

"[T]he fact that a robbery involves a gun . . . , on its own and with nothing more presented, is not sufficient to support a finding of reckless indifference to human life." (*Clark, supra,* 63 Cal.4th at p. 617.) Nor is a defendant's awareness that a gun will be used sufficient. (*Id.* at p. 618.)

The Attorney General argues that "[b]y including a firearm to the instant robbery, [defendants] radically increased the danger of the crime in a way that demonstrated a reckless indifference to human life." Moreover, the Attorney General argues, that defendants continued to remove property from the Khemlanis' car after Sheron was shot suggests they knew their cohort was armed. There is, however, no direct evidence that either defendant knew in advance of the robbery that a gun would be used. The only evidence bearing on either defendant's knowledge of the gun came during the police interview of Castiblanco.

During the interview, an officer asked Castiblanco, "Did you have the gun?" He responded, "No, I didn't, no, no." Thereafter, the officer and Castiblanco discussed whether the gun used was an automatic or a revolver. Castiblanco was not asked if he knew in advance of the robbery that a gun would be used or if he learned of the gun only after Sheron had been shot.

In addition, Carmona's testimony that when she saw Sheron slumped over and bleeding profusely, Castiblanco

appeared shocked and "kind of stood there like looking for a few seconds" suggests that he did not know that a gun would be used.

There was evidence that Castiblanco brought a knife to the robbery—his DNA was on the knife found underneath the right rear tire on the Khemlanis' car. Consistent with testimony from the prosecution's expert witness, Detective Raffi, and based on where the knife was found, it appears the robbers intended to use the knife to puncture the Khemlanis' tire. Although Detective Raffi testified that typically a robber used a knife to restrain a driver, the prosecution did not present any evidence that any of the robbers used the knife to force the Khemlanis to turn over their property. Accordingly, the weapons evidence was insufficient to support the conclusion that defendants exhibited reckless indifference to human life.

ii. Physical presence at the crime and opportunities to restrain the crime and/or aid the victim

Presence is important to culpability because it allows a defendant to observe his cohorts' actions and demeanors and determine whether their behavior tends to suggest a willingness to use lethal force. (*Clark, supra,* 63 Cal.4th at p. 619.) Presence also provides a defendant opportunities to act as a restraining influence on his cohorts and to render aid to a wounded victim. (*Ibid.*)

Both defendants were present at the scene and so were in a position to stop the shooting or assist Sheron. Castiblanco's "shocked" reaction to the shooting suggested the shooting was sudden and unanticipated such that he would not have had the

opportunity to intervene. There is no evidence that Cortez attempted to intervene or about his reaction to the shooting. There also is no evidence that either defendant attempted to render aid to Sheron. Instead, the evidence showed that Cortez continued to struggle with Nimon so that Castiblanco and the third robber could take property from the Khemlanis' car. After securing the property, the robbers fled.

In *Clark, supra,* 63 Cal.4th 522, the court observed that the circumstances surrounding the defendant's flight from the scene was ambiguous. (*Id.* at p. 620.) A police officer had arrived at the scene and the defendant fled without the shooter. (*Ibid.*) The court reasoned such conduct may have been a rejection of the shooter's actions in committing the shooting or a reflection of the defendant's desire to flee the scene as quickly as possible without regard for the shooting victim's welfare. (*Ibid.*) But, the court noted, "unlike in the Tisons' case, defendant would have known that help in the form of police intervention was arriving."[6] (*Ibid.*) Sheron was shot in a parking lot with others present, including Nimon who attended to his brother before the police and firemen arrived.

The evidence concerning defendants' physical presence at the scene, viewed in the light most favorable to the judgment, weighs in favor of a finding of reckless indifference to human life. Neither defendant may have been in a position to stop an unanticipated shooting, but neither rendered aid when the need arose, instead continuing with their plan to steal the Khemlanis' property.

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[6] The victims in *Tison* were shot in an isolated part of the desert. (*Tison, supra,* 481 U.S. at p. 140.)

iii. Duration of the felony

"Where a victim is held at gunpoint, kidnapped, or otherwise restrained in the presence of perpetrators for prolonged periods, 'there is a greater window of opportunity for violence' [citation], possibly culminating in murder." (*Clark, supra,* 63 Cal.4th at p. 620.) As described by Detective Raffi, the smash and grab robberies were designed to be carried out quickly. Gonzalez testified the smash and grab robbery here lasted only three minutes. The evidence of duration was insufficient to support the conclusion that defendants exhibited reckless indifference to human life.

iv. Defendants' knowledge of cohort's likelihood of killing

"A defendant's willingness to engage in an armed robbery with individuals known to him to use lethal force may give rise to the inference that the defendant disregarded a 'grave risk of death.' (*Tison, supra,* 481 U.S. at p. 157.)" (*Clark, supra,* 63 Cal.4th at p. 621.) The prosecution presented no evidence that the shooter had a propensity for violence, let alone evidence that defendants were aware of such a propensity. Accordingly, this factor does not increase defendants' culpability.

v. Defendants' efforts to minimize the risks of the violence during the felony

Detective Raffi testified Colombian crews preferred not to have confrontations with or to harm their victims. The smash

and grab robberies appear to have been well-scripted and designed to disorient their victims so the robbers could take their victims' property easily and without seriously injuring them. From the evidence presented at trial, "there appears to be nothing in the [smash and grab] plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Clark, supra,* 63 Cal.4th at p. 623.) Accordingly, this factor minimizes defendants' culpability.

Considering the totality of the circumstances from the evidence presented at defendants' trial (*Banks, supra,* 61 Cal.4th at p. 802) and the factors identified in *Clark, supra,* 63 Cal.4th at pages 618 through 623, we conclude there was insufficient evidence that either defendant acted with reckless indifference to human life. Accordingly, defendants' special circumstance findings are reversed.

Because we reverse Castiblanco's special circumstance finding, we need not address his argument that the prosecutor committed misconduct in misstating the requirements for a true finding on the special circumstance allegation.

C. *The Parole Revocation Fine*

Castiblanco argues his $1,000 parole revocation fine under section 1202.45 should be reversed if we do not reverse his sentence of life without the possibility of parole (LWOP). "A parole revocation fine may not be imposed for a term of life in prison without possibility of parole, as the statute is expressly inapplicable where there is no period of parole." (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) Because we reverse Castiblanco's special circumstance finding, Castiblanco is no

longer subject to an LWOP sentence, thus mooting his parole revocation fine argument.

D. *The Admission of "Gang" Evidence*

Cortez contends the trial court abused its discretion when it permitted the prosecution to introduce Detective Raffi's testimony about the manner in which Colombian crews commit smash and grab robberies. He argues that although the word "gang" was not used, the evidence portrayed him as a violent gang member and did not prove his identity. Cortez forfeited appellate review of this issue by failing to object in the trial court. Moreover, even if the issue had been preserved and Cortez was able to show the trial court erred in admitting the testimony, any error was harmless.

1. Standard of Review

A trial court's decision to admit or exclude expert witness testimony is reviewed for an abuse of discretion. (*People v. McDowell* (2012) 54 Cal.4th 395, 426.)

2. Background

During direct examination, the prosecutor asked Detective Raffi, "So in terms of these South American and Colombian groups, detective, can you explain what procedures they actually use to conduct take-down robberies?" Castiblanco's counsel objected that the testimony was irrelevant.

In a hearing outside the presence of the jury, Castiblanco's counsel stated she understood the People were "not making any gang allegations or proceeding on any additional facts that this is some sort of mafia or Colombian gang." Yet, the prosecution was "eliciting evidence of what these Colombian or South American gangs do or how they commit robberies." Castiblanco's counsel argued the testimony was irrelevant and prejudicial.

The prosecutor responded that he had neither elicited nor used the word "gang" and Detective Raffi was "explaining in his training and experience how these groups work together. This goes to the modus operandi of the group. No one is saying that they are gang members."

The trial court observed, "I think, however you want to call them, a group, you're using the word gang. I didn't know that I saw the word gang in here, but I might have missed it, but, clearly, the People made no secret of the fact that they're proceeding on a conspiracy theory. That the defendants belong to a group of individuals who committed robberies as basically their primary function." The trial court ruled that Detective Raffi's testimony was admissible to prove the conspiracy theory. It added, however, that it would make clear to the jury that this was not a criminal street gang case.

Defense counsel further objected that she had not received discovery concerning Detective Raffi's testimony. After a brief discussion of the prosecution's discovery duty, the trial court again stated that it was important to explain to the jury that this was not a criminal street gang case. Cortez's counsel asked, "I'm assuming it's agreed that 'gang' isn't going to be used in questions or answers, the term 'gang'? It hasn't been done yet." The trial court responded, "Right to the best of our ability."

After Detective Raffi explained to the trial court the Colombian crews' use of violence in obtaining property, the trial court permitted Cortez's counsel to inquire into that area. On voir dire, Cortez's counsel asked Detective Raffi whether the Colombian crews' methods of operating were unique to them or shared by other South American groups. Detective Raffi responded that the Colombian crews' methods for conducting jewelry salesman and bank patron robberies were unique to them. He also testified that Colombian crews typically were comprised only of Colombians. Castiblanco's counsel then examined Detective Raffi on voir dire.

3. Analysis

A defendant forfeits appellate review of the admissibility of evidence by failing to object to the evidence in the trial court or to join a co-defendant's objection. (*People v. Wilson* (2008) 44 Cal.4th 758, 792-793.) Cortez did not object that Detective Raffi's testimony about Colombian crews was really gang evidence and did not join Castiblanco's objection.

Even if Cortez had preserved the issue for appellate review and were able to show the trial court erred in admitting Detective Raffi's testimony, any error was harmless because, as discussed below, eyewitness and other evidence showed that Cortez was one of the robbers.

In his reply brief, Cortez argues that if the issue has been forfeited for appellate review, then defense counsel provided ineffective assistance of counsel. In reviewing a claim of ineffective assistance of counsel, a reviewing "court need not determine whether counsel's performance was deficient before

examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Welch* (2015) 61 Cal.4th 489, 516.) As we have explained, the admission of Detective Raffi's testimony was not prejudicial.

E. *Evidence Identifying Cortez*

Cortez makes a number of claims with respect to the identity evidence adduced at trial: (1) the trial court abused its discretion when it restricted and derided as biased Dr. Pezdek's testimony on eyewitness identifications, (2) the trial court abused its discretion when it admitted other crimes evidence under Evidence Code section 1101, subdivision (b), and (3) Flores's testimony was untrustworthy. Cortez argues that without the curtailment of Dr. Pezdek's testimony, the admission of other crimes evidence, and Flores's untrustworthy testimony there was insufficient evidence identifying him as one of the robbers. We disagree.

1. Standards of Review

We review a trial court's "decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification" for an abuse of discretion. (*People v. McDonald* (1984) 37 Cal.3d 351, 377 overruled on another ground by *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Likewise, we review a trial court's ruling on the admissibility of evidence under

Evidence Code section 1101, subdivision (b) for an abuse of discretion. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.)

2. Analysis

a. Dr. Pezdek's testimony

"[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Leigh* (1985) 168 Cal.App.3d 217, 221 ["the testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions"].)

At trial, Carmona and Gonzalez identified Cortez as one of the robbers. Carmona testified that Cortez was the person "breaking the passenger's window struggling with the passenger." Cortez reached and leaned into the car and punched the passenger. Carmona was within eight to 10 feet of the person she identified as Cortez. By itself, Carmona's testimony was sufficient to support Cortez's conviction. (*People v. Young, supra,* 34 Cal.4th at p. 1181; *People v. Leigh, supra,* 168 Cal.App.3d at p. 221.)

Gonzalez also identified Cortez as the person who broke the passenger window and fought with the passenger. She testified that the person she identified as Cortez was wearing a dark hoodie and pants and sunglasses. The entire incident lasted about three minutes; Cortez struggled with the passenger for about two or two and a half of those minutes. Gonzalez testified she was able to identify Cortez as one of the robbers because,

during the robbery, his "sweater got kind of undone, and [she] was able to see more of him." She saw every part of his face except his eyes. She also was able to see his skin tone and hair color. Like Carmona's testimony, Gonzalez's testimony on its own was sufficient to support Cortez's conviction. (*People v. Young, supra,* 34 Cal.4th at p. 1181; *People v. Leigh, supra,* 168 Cal.App.3d at p. 221.)

To cast doubt on Carmona's and Gonzalez's testimony, Castiblanco called Dr. Pezdek. The trial court appointed Dr. Pezdek to consult with the defense about witness examinations and to testify as an expert. Prior to her testimony, the prosecutor requested an Evidence Code section 402 hearing because he was concerned, based on Dr. Pezdek's report, that Dr. Pezdek was "going to testify as to applying the facts of this case rather than just being like most identification experts, describing different factors [¶] . . . [¶] that affect people's ability to identify." Specifically, the prosecutor noted his objection to Dr. Pezdek's statement in her report that "'[i]n this case, based on Ms. Carmona's description of the event, she only had a brief period of time to look at each of the three perpetrators.'"

The trial court ruled that Dr. Pezdek was permitted, under the law, to testify about factors that affect identification, but not the specific facts of this case. The trial court asked Dr. Pezdek if she understood its ruling limiting her testimony—i.e., that she could not talk about the facts of the case. Dr. Pezdek said she understood.

Castiblanco's attorney said, "I understand that the letter includes this language, but this is not what—I understand that that's not what is allowed under the Evidence Code, and I understand it's not—I won't be asking her those questions."

During her testimony explaining the biased identification test factor, Dr. Pezdek testified that she believed the police identification procedure in which a suspect's photograph is placed in a six-pack lineup provides reliable identifications. She then said, "Anytime an eyewitness identification is made under other circumstances, perhaps when only one person is shown, or, you know, there is—" The prosecutor objected and the trial court sustained the objection.

Castiblanco's counsel resumed her examination about six-pack lineups. The prosecutor objected again and the trial court heard the matter outside the presence of the jury. The prosecutor objected that Dr. Pezdek was using testimony about identification factors to tell the jury about specific facts in the case. He questioned the need to address six-pack lineups when one was not conducted in this case.

The trial court observed that Dr. Pezdek was an eyewitness identification expert and not an expert on police procedures or whether a six-pack identification should be conducted. Castiblanco's counsel responded that Dr. Pezdek was an expert on why a six-pack identification should be conducted. Cortez's counsel also argued Dr. Pezdek was an expert and qualified to testify. The trial court found Dr. Pezdek was not such an expert and ruled she would not be permitted to testify about why a six-pack identification should be conducted. It explained that it would not permit Dr. Pezdek to testify about matters that were not part of the case.

The prosecutor further objected that Dr. Pezdek was using examples in explaining the eyewitness identification factors that matched the facts in this case. The trial court ruled that Dr.

Pezdek was not permitted to tailor her testimony to the specific facts of the case.

On cross-examination, the prosecutor asked Dr. Pezdek, "[Y]ou're not here to say whether or not a particular individual can identify another individual? You're just saying—you're here just to talk about factors that can influence a person's identification?" Dr. Pezdek responded, "Well, it's my understanding that you can't ask me about the ability of any particular person to make an identification, that I can only comment for legal reasons on factors that apply to the general population and not to any particular witness in this case just for legal reasons." The prosecutor said, "That's correct, and that's what I'm just saying is that's—you're here only to talk about the specific factors, correct?" Dr. Pezdek responded, "Because you limited my testimony in that way, correct."

The trial court interjected, "Actually, he hasn't. I have, and it's for legal reasons, and that's the way it's gonna be." The trial court asked Dr. Pezdek, "So with that, you're here to talk about the factors, yes or no?" Dr. Pezdek answered, "Yes." Her cross-examination then resumed.

At the conclusion of Dr. Pezdek's testimony, the trial court spoke with the attorneys outside the presence of the jury concerning Dr. Pezdek's testimony that the prosecutor had limited her testimony. It stated it had tried to correct the impression left with the jury that she had relevant testimony that she was prevented from giving. The trial court stated that Dr. Pezdek's testimony was unacceptable and that it would have to address the matter further. It asked counsel for the parties to consider appropriate corrective actions.

After a break, the prosecutor presented a proposed instruction. Counsel for both defendants approved the instruction. The trial court said it would modify the instruction to state that it was striking Dr. Pezdek's objectionable testimony.

When the jury returned, the trial court instructed it as follows: "Attorneys may make objections to the court if they believe something is inappropriate for a jury to hear. You are not to consider whether an objection was made and why it was made. Dr. Pezdek's statements about evidence that she was prohibited from testifying is not evidence and should not be considered by you for any matter. And I am ordering you to disregard it.

"These statements were a violation of a prior order that I made. My duty is to rule on the law and to make sure jurors hear only appropriate and proper testimony at evidence." It added that it was "striking that portion of Dr. Pezdek's testimony in which she indicated otherwise to my order."

Cortez claims the trial court erred when it instructed Dr. Pezdek not to discuss any facts of the case and when it barred her from testifying "generically about the efficacy of six-pack identifications." He further claims the trial court erred in declaring her a "biased witness."

When the trial court ruled at the Evidence Code section 402 hearing that Dr. Pezdek could not testify about case specific facts, neither defense counsel objected. Instead, Castiblanco's attorney agreed with the trial court's ruling, saying, "I understand that that's not what's allowed under the Evidence Code, and I understand it's not—I won't be asking her those questions." By failing to object, Cortez forfeited his claim that the trial court erred in preventing Dr. Pezdek from testifying about case facts. (*People v. Clark* (1992) 3 Cal.4th 41, 125-126 ["In the absence of a

timely and specific objection on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed"].)

As for Dr. Pezdek's testimony about six-pack lineups, Cortez's counsel argued Dr. Pezdek was an expert and qualified to testify. Thus, the issue was preserved for appellate review. Nevertheless, Cortez fails to demonstrate that the trial court abused its discretion in barring Dr. Pezdek's six-pack lineup testimony. (*People v. McDonald, supra,* 37 Cal.3d at p. 377.)

"Prejudicial error must be affirmatively demonstrated and will not be presumed." (*People v. Bell* (1998) 61 Cal.App.4th 282, 291.) "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

In his opening brief, Cortez's only mention of the trial court's six-pack lineup ruling is as follows: "The court barred Dr. Pezdek from testifying generically about the efficacy of six-pack identifications because she allegedly was not an expert in police procedures or bias identification tests even though that is part of her expertise, training, and studies she has done." Cortez does not explain why the trial court's ruling excluding that testimony was an abuse of discretion. That is, he does not discuss the admissibility of the six-pack lineup testimony or set forth Dr. Pezdek's qualifications to testify as an expert on the subject. Cortez's reply brief is deficient for the same reasons. There, Cortez's sole apparent reference to the six-pack lineup testimony is: "[T]he crux of Cortez's complaint is that the expert should have been permitted to educate the jury on various procedures that can lead to more accurate identifications." Accordingly, Cortez has failed to meet his burden of demonstrating prejudicial

error. (*Paterno v. State of California, supra,* 74 Cal.App.4th at p. 106; *People v. Bell, supra,* 61 Cal.App.4th at p. 291.)

Cortez also claims the trial court erred in declaring Dr. Pezdek a biased witness.[7] Cortez does not develop this issue and has therefore forfeited appellate review. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11 [matters perfunctorily asserted without argument or supporting authorities are not properly raised].) Moreover, the trial court made the comment outside of the presence of the jury, and thus the comment was harmless.

b. Other crimes evidence

Cortez contends the trial court abused its discretion in admitting other crimes evidence under Evidence Code section 1101, subdivision (b)[8] to prove his identity. He argues, "When a primary issue of fact is whether defendant rather than some other person was the perpetrator of the crime charged, evidence

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[7] At sidebar, the trial court commented that Dr. Pezdek gave "highly inappropriate" testimony suggesting that she only is retained in cases in which witnesses have been wrong in their identifications. Thus, it observed, "From that, her bias, I think was shown . . . ."

[8] Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

of other crimes is admissible only if it discloses a *distinctive* modus operandi common to both the other crimes and the charged crime." That distinctiveness, he argues, was missing from the other crimes evidence. Even assuming the trial court erred in admitting the other crimes evidence, any such error was harmless.

The erroneous admission of evidence prohibited by section 1101, subdivision (b) is reviewed for prejudice under the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818. Under that standard, a judgment may be overturned only if the defendant shows "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Id.* at p. 836.)

As discussed above, the testimony of a single witness is sufficient to support a conviction unless the testimony is physically impossible or inherently improbable. (*People v. Young, supra,* 34 Cal.4th at p. 1181; *People v. Leigh, supra,* 168 Cal.App.3d at p. 221.) Carmona and Gonzalez each identified Cortez as one of the robbers. Moreover, Cortez made self-incriminating statements to Castiblanco while they were being held at the West Covina jail and Flores gave testimony incriminating Cortez. Given that evidence, it is not reasonably probable that the jury would have acquitted Cortez if the other crimes evidence had not been admitted. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

c. Flores's testimony

Cortez contends Flores's testimony was insufficient to support his identification as one of the robbers. He argues

Flores's statements and testimony incriminating him were untrustworthy because Flores had been hoping for leniency in a federal illegal re-entry case against her and she was afraid law enforcement would remove her son from her custody.

When considering a claim that insufficient evidence supports a judgment, we do not reevaluate a witness's credibility. (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 200.) Witness credibility is a matter for the jury. (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) The jury heard the evidence that Cortez asserts rendered Flores's incriminating statements and testimony untrustworthy and decided whether she was credible. That was the jury's call and not ours. (*People v. Elliott, supra,* 53 Cal.4th at p. 585; *People v. Whisenhunt, supra,* 44 Cal.4th at p. 200.)

Cortez's challenge to his convictions through his challenge to Flores's credibility is ultimately unavailing for another reason. As we discuss above, Carmona's and Gonzalez's eyewitness identifications of Cortez was sufficient to support Cortez's identity as one of the robbers. (*People v. Young, supra,* 34 Cal.4th at p. 1181; *People v. Leigh, supra,* 168 Cal.App.3d at p. 221). In addition, Cortez made self-incriminating statements to Castiblanco while they were being held at the West Covina jail, speculating that based on the police officers' questioning of defendants, the police must not have sufficient evidence because if they had, "they would have had us by, by the neck."

F. *Severance of Cortez's Trial from Castiblanco's Trial*

Cortez contends the trial court abused its discretion in failing to sever his trial from Castiblanco's trial. We disagree.

1. Standard of Review

"A trial court's denial of a motion for severance 'may be reversed only if the court has abused its discretion. [Citations.] An abuse of discretion may be found when the trial court's ruling "'falls outside the bounds of reason.'" [Citation.]' [Citation.]" (*People v. Ramirez* (2006) 39 Cal.4th 398, 439 (*Ramirez*).)

2. Analysis

Castiblanco moved to sever his trial from Cortez's trial. Cortez joined the motion. Castiblanco argued the prosecution intended to introduce a tape recording of a police interview of Flores in which she related statements by Cortez about the charged crimes that also implicated Castiblanco. Those statements, Castiblanco argued, could not be sanitized in a way that would allow him a fair trial. Also, the prosecution intended to present evidence about the Evanston burglary that only involved Cortez. Cortez made no arguments in support of severance at the hearing on the motion.

On appeal, Cortez tries to recast the severance issue addressed in the trial court, arguing a joint trial was unfair to him because without severance the jury was permitted to hear testimony about uncharged crimes Castiblanco committed that were not admissible against him (Cortez), the uncharged crimes evidence was inflammatory, and the case against Castiblanco was stronger than the case against him. Those grounds had nothing to do with the severance motion Castiblanco brought and the trial court ruled upon—that is, that severance was required because evidence admissible against Cortez would be prejudicial

in the case against Castiblanco. Because Cortez did not raise any of the grounds he asserts on appeal in the trial court, he has forfeited on appeal his challenge to the trial court's denial of severance. (*Ramirez, supra,* 39 Cal.4th at p. 439 [a "defendant is limited on appeal to arguing that the trial court erred in failing to sever the charges" as "requested at trial"].)

G. *Natural and Probable Consequences First Degree Murder Instruction*

Cortez contends the trial court erred in instructing the jury that it could find him guilty of first degree murder under the natural and probable consequences doctrine. We agree, but hold the error was harmless.

"[A]n aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 158-159 (*Chiu*).) "An aider and abettor's liability for murder under the natural and probable consequences doctrine operates independently of the felony-murder rule. [Citation.]" (*Id.* at p. 166.) The Supreme Court's holding in *Chiu* "does not affect or limit an aider and abettor's liability for first degree felony murder under section 189." (*Ibid.*)

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.]" (*Chiu, supra,* 59 Cal.4th at p. 167.) We must reverse Cortez's murder

conviction "unless we conclude beyond a reasonable doubt that the jury based its verdict on [a] legally valid theory[.]" (*Ibid.*)

Here, the trial court instructed the jury on murder under the natural and probable consequences doctrine[9], a conspiracy theory[10], and the felony murder rule[11]. It erred in instructing

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9 The trial court instructed the jury with CALJIC No. 3.02 ("Principals—Liability for Natural and Probable Consequences") as follows:

"One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes [*sic*] originally aided and abetted.

"In order to find the defendant guilty of the crimes [*sic*] of Murder under this theory, as charged in Count one, you must be satisfied beyond a reasonable doubt that:

"1. The crime of Robbery [was] committed;

"2. That the defendant aided and abetted that crime;

"3. That a co-principal in that crime committed the crime of Murder; and

"4. The crime of Murder was a natural and probable consequence of the commission of the crime of Robbery.

"In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

10 The trial court instructed the jury with CALJIC No. 6.11 ("Conspiracy—Joint Responsibility") as follows:

"Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration is in furtherance of the object of the conspiracy.

"The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.

"A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy, even though that crime or act was not intended as a part of the agreed upon objective and even though he was not present at the time of the commission of that crime act [*sic*].

"You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and, if so, whether the crime alleged in Count one was perpetrated by a co-conspirator[ ] in furtherance of that conspiracy and was a natural and probable consequence of the agreed upon criminal objective of that conspiracy.

"In determining whether a consequence is 'natural and probable' you must apply an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural consequence' is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

The trial court instructed the jury with CALJIC No. 6.23 ("Conspiracies and Substantive Crimes Charged and Overt Acts Alleged") that defendants were charged with conspiracy to commit robbery.

[11] The trial court instructed the jury with CALJIC No. 8.21 ("First Degree Felony-Murder") as follows:

"The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of ROBBERY is murder of the first degree when the perpetrator had the specific intent to commit that crime.

"The specific intent to commit ROBBERY and the commission or attempted commission of that crime must be proved beyond a reasonable doubt.

"In law, a killing occurs during the commission of a felony, so long as the fatal blow is struck during its course, even if death does not then result."

The trial court instructed the jury with CALJIC No. 8.26 ("First Degree Felony-Murder—In Pursuance of a Conspiracy") as follows:

"If a number of persons conspire together to commit ROBBERY, and if the life of another person is taken by one or more of them in the perpetration of that crime, and if the killing is done in furtherance of the common design and to further that common purpose, or is the natural and probable consequence of the pursuit of that purpose, all of the co-conspirators are equally guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental.

"In determining whether a result is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

that defendants could be found guilty of first degree murder on a natural and probable consequences theory. (*Chiu, supra,* 59 Cal.4th at pp. 158-159.) The error was harmless, however, because we conclude beyond a reasonable doubt, based on the jury's special circumstance finding, that the jury based its verdict on a legally valid theory—i.e., felony murder. (*Chiu, supra,* 59 Cal.4th at p. 167.)

The trial court instructed the jury on the "murder in the commission of a robbery" special circumstance with CALJIC No. 8.80.1, in relevant part, as follows: "If you find that a defendant was not the actual killer of a human being but was an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that the defendant acted with reckless indifference to human life and as a major participant, aided, abetted, counseled, or assisted in the

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The trial court instructed the jury with CALJIC No. 8.27 ("First Degree Felony-Murder—Aider and Abettor") as follows:

"If a human being is killed by any one of several persons engaged in the commission of the crime of ROBBERY, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental.

"In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the ROBBERY at the time the fatal wound was inflicted."

commission of the crime of ROBBERY which resulted in the death of a human being, namely SHERON KHEMLANI." The jury found true the special circumstance allegation as follows: "We further find that the murder of SHERON KHEMLANI was committed by defendant JUAN ALEJANDRO CORTEZ while the said defendant was engaged in the commission of the crime of robbery . . . ." The jury thus concluded that Cortez committed a felony murder.

H. *Cumulative Error*

Cortez contends the cumulative effect of the errors in his trial requires reversal of the judgment. We disagree. Cortez claims that the trial court's erroneous evidentiary rulings on the Colombian crew testimony, the uncharged crimes evidence, Flores's testimony, and Dr. Pezdek's testimony combined to deprive him of a fair trial. Even if each of those rulings was erroneous, there was no cumulative prejudicial effect. (*People v. Melendez* (2016) 2 Cal.5th 1, 33.) The issue of Cortez's identity was not close. Two eyewitnesses—Carmona and Gonzalez—identified Cortez as one of the robbers and Cortez had made incriminating statements to Castiblanco while in jail.

IV. DISPOSITION

Defendants' special circumstance findings are reversed. The judgments are otherwise affirmed. The matter is remanded for resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

MOOR, Acting P. J.

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.